WILL A NOTICE OF MOTION UNDER SECTION 3211 OF THE CODE OF VIRGINIA LIE FOR THE RECOVERY OF MONEY DUE BY JUDGMENT OR DECREE OF A DOMESTIC COURT OF RECORD?

In case of Cardwell *v.* Talbott, 5 Va. L. Reg. p. 182 it is said:

"Although judgments and decrees for money may be enforced by execution, the plaintiff may have an action for judgment thereon, under § 3577 of the Code, or a motion for judgment under § 3211. There is no distinction in this respect between judgments and decrees."

Opposed to this are the two following views:

"A domestic judgment is of such high dignity, that in the absence of statute, debt only will lie on it, and not assumpsit; and not a notice of motion, which is not of higher dignity than an action of assumpsit."
Burks Pl. & Pr. § 99 p. 172 note.

"A judgment on a cause of action not arising out of contract, is not a contract, lacking as it does the *aggregatio mentium.*"
Editor's Comment, 5 Va. Law Reg. p. 187 on case of Cardwell *v.* Talbott, *supra.*

"A judgment founded on a tort is in no sense a contract."
White *v* Crump, 19 W. Va. 583, 592, 594; Peerce *v.* Kitzmiller, 19 W. Va. 564, 576.

A judgment founded on a contract is in no sense a contract. It is a record. After judgment, the original cause of action, whether arising *ex delicto* or *ex contractu*, is *merged* into the *record.*

"A judgment or decree by consent comes nearer to a contract than any other, but even such is only the result of an antecedent contract, liability or penalty."
Elliott on Contracts § 2747.

By the early writers, a judgment was classified as a "contract of record" for the express purpose of adapting it to the remedy by action of debt, which was the appropriate remedy for the recovery of a sum certain.

Elliott on Contracts §§ 2 and 2747.

Upon this merged cause of action, into the judgment of the

court of record, an action of debt lies, not because the judgment is a contract, but because debt is the appropriate remedy for the recovery of a sum certain.

III Comyn's Digt. (Debt) p. 860; 1 Chitty Pl. pp. 106 to 113; Burks Pl. & Pr. §§ 68 and 71.

"Domestic judgments are matter of record, and for that reason, are regarded of such solemn nature, that an action of debt is the only remedy."

Burks Pl. & Pr. § 71 pp. 93 and 94.

"It is true that an action of debt lies for a statutory penalty, but this is because the sum demanded is certain, and not because the cause of action arises *ex contractu*."

Western Union Telegraph Co. *v.* Bright, 90 Va. 780.

It has been held that the word "contract" as used in the statute was intended to include judgments, so as to give jurisdiction to a justice of the peace thereon.

Martstiller *v.* Ward, 52 W. Va. 74, 83.

But the word *contract* as used in § 3211 of the Code of Virginia is one not affecting the jurisdiction, but one affecting the *remedy* only.

"The object of § 3211 of the Code was to afford a more speedy remedy for the enforcement of contracts."

Preston *v.* Salem Improvement Co., 91 Va. 584.

"The proceeding by motion for judgment is simply a new remedy. * * *"

West Disinfecting Co. *v.* Gunn, 19 Va. L. Reg. 355.

"Section 3211 authorizes the remedy by motion only in those cases in which the plaintiff is entitled to recover money by action on a contract."

Western Union Telegraph Co. *v.* Bright, 90 Va. 780.

Until the remedy by motion was recently extended, damages arising out of a contract were not recoverable, in this proceeding.

Wilson *v.* Dawson, 96 Va. 687.

The legislature acquiescing in this interpretation, several times amended the section in question, each time enlarging its scope, but always retaining the word "contract," except in the Act of

Feb. 27, 1914, where it was omitted, but it was restored in the Acts of 1916. As there is not an absence of remedy, or doubtful words to construe, the conclusion seems irresistible that a notice of motion does not lie on a judgment or decree of a domestic court of record, and that an action of debt alone lies.

Section 3577 of the Code point out that:

> "An action may be brought within ten years after the date of the judgment."

The word "motion" has never been construed by the Virginia courts to be interchangeable with the word "action."

The plaintiff may have as many actions, subject only to the imposition of costs, on his judgment, as he may deem necessary, but, of course, but one satisfaction, yet such actions are not favored.

Kelley *v.* Hamblen. 98 Va. 389.

Actions on judgments not being favored, where not absolutely necessary, even where necessary, as the action of debt lies, there seems no good reason for extending the language of § 3211 of the Code by construction, so as to include judgments and decrees for money.

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